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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY cm

NO. 37693-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

STEPHANIE McCARTY,

Appellant.

FILED  
COURT OF APPEALS DIV. II  
STATE OF WASHINGTON  
2008 SEP 25 PM 4:08

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable George Wood, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in granting the State's motion to preclude appellant from presenting an affirmative defense of medical marijuana use.

2. The court erred in entering its Memorandum Opinion and Order concluding the physician statement authorizing the use of marijuana for medical purposes did not meet the requirements to qualify appellant to assert an affirmative defense of medical marijuana use.

3. The court erred in entering its Memorandum Opinion and Order where concluding appellant's offer of proof did not cure any perceived defect in the physician's written authorization to use marijuana for medical purposes because the documents contained in the offer of proof were not presented to police when police executed the search warrant and seized the marijuana.

4. The trial court violated CrR 6.1(d) by failing to file written findings of fact and conclusions of law after appellant's stipulated facts bench trial.

Issues Pertaining to Assignments of Error

1. When police executed a search warrant and seized marijuana from the home appellant shared with the co-defendant, the co-defendant provided police with written documentation that he was the designated

caregiver to a Mr. King as well as written documentation from Mr. King's physician stating Mr. King should be able to use marijuana. Did the court err in concluding the physician's written statement was not valid documentation?

2. Did the court err in concluding appellant's offer of proof did not cure any defects in the physician's statement authorizing Mr. King's use of marijuana for medical purposes?

3. After appellant was charged but before trial, the Legislature amended the Medical Use of Marijuana Act. The physician's initial authorization for Mr. King to use marijuana for medical purposes met the valid documentation requirements as amended. Did the amendments to the Medical Use of Marijuana Act apply to appellant's case?

4. Did the court err when it entered its order granting the State's motion to preclude appellant from asserting an affirmative defense of medical marijuana use as a designated caretaker?

5. CrR 6.1(d) requires entry of written findings of fact and conclusions of law at the conclusion of a bench trial. The trial court failed to enter written findings and conclusions after the appellant's stipulated facts bench trial. Should this Court remand for entry of written findings and conclusions?

B. STATEMENT OF THE CASE

1. Procedural Facts

On March 14, 2007, Stephanie McCarty was charged in Clallam County Superior Court with the manufacture of marijuana. CP 96. Prior to trial, the State moved in limine to preclude McCarty from presenting the affirmative defense of medical use of marijuana as a designated caregiver. McCarty responded she was entitled to present the affirmative defense and submitted an offer of proof. CP 66, 85. The court granted the State's motion. CP 60.

McCarty and co-defendant, Earl Otis, then stipulated to the facts contained in the police reports. CP 17. The court found McCarty and Otis guilty as charged. RP 14-15 (4/17/2008). The court did not enter any written findings of fact or conclusions of law.

McCarty received a sentence of 45 days. CP 05. The court converted 30 days of the sentence to 240 hours of community service. Id.

2. Facts Pertaining to Assignments of Error 1, 2 and 3

On March 10, 2007 Police executed a search warrant on the home shared by McCarty and Otis. CP 17 (Attachment A and B); CP 60. They found 75 marijuana plants. CP 60. When police were in the home

executing the warrant, Otis provided them with a document dated November 14, 2005 from a Ronald King. It stated:

I, Ronald Dean King Jr., am terminally ill with the AIDS VIRUS. And I am designating Earl Otis as my caregiver. In accordance with Chapter 69.51A.040 RCW. On this day Monday November 14, 2005.

CP 60.

Otis also provided police with a written document from Dr. Rakita dated October 20, 2005. In that document Dr. Rakita states:

To Whom It May Concern:  
RE: Ronald King  
Mr. King should be able to use marijuana for appetite stimulations. He has tried Marinol, but it is not effective for him and he has lost weight.

CP 60.

The State moved to preclude McCarty and Otis from presenting the affirmative defense of medical use of marijuana. In response to the motion, the court requested McCarty and Otis submit an offer of proof. CP 83. The offer of proof contained a written statement from Dr. Rakita and Mr. King's medical records. The medical records showed Mr. King was diagnosed with human immunodeficiency virus (HIV) and that his use of marijuana reduced the nauseating effects of the drugs proscribed to treat

his illness and improved his appetite.<sup>1</sup> CP 66. In his written statement, dated December 21, 2007, Dr. Rakita states:

Mr. King has been a patient of mine, off and on, since 2000. A question has been raised regarding his use of marijuana for medical purposes. As can be seen from his medical records, we had discussed this on multiple occasions in 2000 and again in 2005. he indicated that this was very helpful to improve his appetite and reduce his nausea. For him, the medical benefits outweighed the risks.

CP 66.

The court entered a Memorandum Opinion and Order. CP 60. Despite McCarty's offer of proof, the court, granted the State's motion to preclude McCarty and Otis from asserting an affirmative defense of medical use of marijuana. Id. The court concluded Dr. Rakita's October, 2005 statement did not meet the statutory definition of "valid documentation" and under case law, Dr. Rakita's December 21, 2007 statement did not cure the defect because McCarty and Otis did not possess that statement at the time police executed the warrant. Id.

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<sup>1</sup> Mr. King died from his illness while the case was pending. RP 7 (5/1/2008).

C. ARGUMENTS

1. THE COURT DENIED APPELLANT HER RIGHT TO ASSERT AN AFFIRMATIVE DEFENSE OF MEDICAL USE OF MARIJUANA AS A DESIGNATED CAREGIVER.

A defendant has the right to present a defense. State v. Ginn, 128 Wn. App. 872, 879, 117 P.3d 1155 (2005) (citations omitted). Washington's Medical Use of Marijuana Act (Act), provides an affirmative defense for patients and caregivers charged with possessing marijuana. RCW 69.51A.005; State v. Phelps, 118 Wn. App. 740, 743, 77 P.3d 678 (2003) (citing State v. Shepherd, 110 Wn. App. 544, 549, 41 P.3d 1235, *review denied*, 147 Wn.2d 1017, 56 P.3d 992 (2002)). In order to qualify for the defense, a defendant has to show by a preponderance of the evidence she has met the Act's statutory requirements. State v. Shepherd, 110 Wn. App. at 550 (citation omitted). "That means, considering all the evidence, the proposition asserted must be more probably true than not true." Id. (citations omitted). In evaluating whether the evidence is sufficient to support an affirmative defense a trial court must interpret the evidence "most strongly" in favor of the defendant. Ginn, 128 Wn. App. at 879.

Under the version of the Act in effect at the time McCarty was charged, to assert an affirmative defense as a caregiver under the Act, she was required to show she met the criteria for a primary caregiver of a

qualified patient, possessed no more marijuana than necessary for the patient's sixty-day medical use and presented valid documentation to any law enforcement official who questioned her regarding her use of marijuana.

Former RCW 69.51A.040.<sup>2</sup>

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<sup>2</sup> RCW 69.51A.040 reads:

(1) If a law enforcement officer determines that marijuana is being possessed lawfully under the medical marijuana law, the officer may document the amount of marijuana, take a representative sample that is large enough to test, but not seize the marijuana. A law enforcement officer or agency shall not be held civilly liable for failure to seize marijuana in this circumstance.

(2) If charged with a violation of state law relating to marijuana, any qualifying patient who is engaged in the medical use of marijuana, or any designated provider who assists a qualifying patient in the medical use of marijuana, will be deemed to have established an affirmative defense to such charges by proof of his or her compliance with the requirements provided in this chapter. Any person meeting the requirements appropriate to his or her status under this chapter shall be considered to have engaged in activities permitted by this chapter and shall not be penalized in any manner, or denied any right or privilege, for such actions.

(3) A qualifying patient, if eighteen years of age or older, or a designated provider shall:

(a) Meet all criteria for status as a qualifying patient or designated provider;

(b) Possess no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply; and

(c) Present his or her valid documentation to any law enforcement official who questions the patient or provider regarding his or her medical use of marijuana.

(continued...)

To meet the qualifications of a primary caregiver, a person was required to present a copy of the qualifying patient's valid documentation as well as a designation to act as primary caregiver, given by the patient, to any law enforcement official requesting the information. Former RCW 69.51A.040(4)(c). Valid documentation was defined in pertinent part as: "A statement signed by a qualifying patient's physician, or a copy of the qualifying patient's pertinent medical records, which states that, in the physician's professional opinion, the potential benefits of the medical use of marijuana would likely outweigh the health risks for a particular qualifying patient." Former RCW 69.51A.010(5)(a).

In its Memorandum Opinion, the court found when police executed the search warrant on the home occupied by McCarty and Otis, Otis not only provided police with a document indicating Mr. King suffers from HIV<sup>3</sup> and naming Otis as Mr. King's caregiver, he also provided police

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<sup>2</sup>(...continued)

(4) A qualifying patient, if under eighteen years of age at the time he or she is alleged to have committed the offense, shall demonstrate compliance with subsection (3)(a) and (c) of this section. However, any possession under subsection (3)(b) of this section, as well as any production, acquisition, and decision as to dosage and frequency of use, shall be the responsibility of the parent or legal guardian of the qualifying patient.

<sup>3</sup> HIV is recognized as a terminal medical condition under the Act. RCW 69.51A.010(4)(a).

with a document dated October 20, 2005, written on stationary with a letterhead from Virginia Mason Medical Clinic, and signed by Dr. Robert Rakita, which stated:

To Whom It May Concern:

RE: Ronald King

Mr. King should be able to use marijuana for appetite stimulations. He has tried Marinol, but it is not effective for him and he has lost weight.

CP 60.

McCarty presented another written document signed by Dr. Rakita dated December 21, 2007, which stated in part that the medical benefits to Mr. King of using marijuana outweighed the risks. The court nonetheless concluded, that under the holdings in State v. Butler, 126 Wn. App. 741, 109 P.3d 493 (2005), and State v. Hanson, 138 Wn. App. 322, 157 P.3d 438 (2007), because Dr. Rakita's October, 2005 statement did not strictly conform to the statute and McCarty and Otis did not possess the December, 2007 statement at the time police executed the warrant, neither were entitled to assert an affirmative defense under the Act. CP 60.<sup>4</sup>

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<sup>4</sup> This was the only basis the court found McCarty was not entitled to assert the affirmative defense. CP 60.

In Butler, the issues were whether the court erroneously denied Butler's motion for a medical marijuana expert and whether he was entitled to raise the common law defense of necessity. 126 Wn. App. at 743. This Court held Butler was not entitled to assert the common law necessity defense and the trial court correctly denied Butler's motion for expert because he made no attempt, "either at the pretrial hearing or at the trial, to offer any documentation from his physician concerning his medical condition or his medical necessity for marijuana." Id. 751. In dicta, this Court stated that "[i]n order to render [the defendant's] marijuana possession legal under the Act, [the defendant] needed to obtain and to possess . . . documentation from his personal physician in advance of law enforcement's questioning his medical use and possession." Id. at 750-51 (emphasis omitted).

In Hanson, issue was whether Hanson could assert the statutory affirmative defense that he used marijuana for medical purposes, where he obtained written authorization to use the marijuana from his physician after the police had seized the marijuana plants but before he was charged. 138 Wn. App. at 324. Hanson was not at the motel when police raided it. He obtained a formal written authorization to use marijuana the day after the police raided his motel but before they charged him. Hanson went to the

police and provided the police with the authorization. The court held Hanson was entitled to assert the affirmative defense because he had valid documentation when police first questioned him. Id. at 327-328.

Here, Dr. Rakita's October, 2005 statement did not expressly state Mr. King's use of marijuana would likely outweigh the health risks. His December 21, 2007 statement, however, submitted in response to the court's request for an offer of proof, did. CP 66; see, State v. Shepherd, 110 Wn. App. 551-552 (doctors statement the use of marijuana "may" outweigh health risk insufficient "valid documentation" to entitle defendant to present affirmative defense under the Act because under the statute the medical opinion must state the use of marijuana "would likely" outweigh health risks). Police were provided the October, 2005 statement when they seized the marijuana. Although that statement did not use the words Mr. King's use of marijuana "would likely" outweigh health risks that was clearly Dr. Rakita's professional opinion as shown by his December 21, 2007 statement.

This case is unlike Butler, because in that case, Butler did not offer any documentation "either at the pretrial hearing or at the trial." Butler, 126 Wn. App. at 751. This case likewise satisfies the holding in Hanson, because McCarty presented written authorization for Mr. King to use

marijuana when first questioned by police and in her offer of proof she presented the physician's clarification of that authorization, which met the statutory requirements. Under the preponderance of the evidence standard, and interpreting the evidence in favor of McCarty, there was sufficient evidence to show that the Act's requirements were met. She was entitled to assert the affirmative defense and the court's conclusion to the contrary was wrong.

Additionally, under the version of the Act effective at the time of trial, Dr. Rakita's October 2005 authorization met the definition of valid documentation. That version applied to this case.

Effective July, 2007, the Legislature amended certain provisions to the Act. (Laws of 2007, ch. 371, § 3, effective July 22, 2007). Among other changes to the Act, the amendments deleted the definition of primary caregiver and added the definition of "designated provider." RCW 69.51A.010(1). The Legislature also changed the definition of "valid documentation." The amendments redefined valid documentation as a "statement signed by a qualifying patient's physician, or a copy of the qualifying patient's pertinent medical records, which states that, in the physician's professional opinion, the patient may benefit from the medical use of marijuana." RCW 69.51A.010(5)(a).

The intent of the amendments were ". . . to clarify the law on medical marijuana so that the lawful use of this substance is not impaired and medical practitioners are able to exercise their best professional judgment in the delivery of medical treatment, qualifying patients may fully participate in the medical use of marijuana, and designated providers may assist patients in the manner provided by this act without fear of state criminal prosecution." (Laws of 2007, ch. 371, § 1). The amendments were ". . . intended to provide clarification to law enforcement and to all participants in the judicial system." *Id.*

The amendments became effective about four months after McCarty was charged and five months before the court's ruling denying her the right to present an affirmative defense. The issue is whether the amendments apply to this case. State v. Heath, 85 Wn.2d 196, 532 P.2d 621 (1975) is instructive.

There, Heath's driver's license was revoked under the Washington Habitual Traffic Offenders Act. Before his license was revoked, Heath began a course of treatment for his alcoholism. On July 16, 1973, an amendment to the Habitual Traffic Offenders Act became effective; it provided that a judge could stay a revocation order where the offenses were the result of alcoholism for which the offender was obtaining treatment.

In August, 1973, the superior court accordingly issued a stay of its previous order revoking Heath's driver's license -- finding that he qualified for the stay due to his treatment. The Director of the Department of Motor Vehicles appealed the stay. Heath, 85 Wn.2d at 197.

The Director argued that the amendment did not authorize stays of revocation orders issued before the effective date of the amendment. In determining that the amendment should be applied retroactively, the Court found "[t]he purpose of the proviso is patently remedial." Heath, 85 Wn.2d at 198. The Court explained, "[i]t allows alcoholics to receive treatment rather than deprive them of their driving privileges. The presumption of retroactivity therefore applies." Id.; see also, In re F.D. Processing, Inc., 119 Wn.2d 452, 460, 832 P.2d 1303 (1992) (remedial legislation presumed to retroactively apply).

Here, as in Heath, the amendments are remedial. Under the amendments a valid document no longer requires a physician to find "the potential benefits of the medical use of marijuana would likely outweigh the health risks." Former RCW 69.51A.010(5)(a). All that is required is a physician's statement that the patient "may benefit from the medical use of marijuana." RCW 69.51A.010(5)(a) (emphasis added). The amendments make clear the Legislature does not and never did intend

criminal sanctions be imposed on a person or the person's caregiver for the possession of marijuana, when the person's physician believes the person may benefit from the use of marijuana, regardless of any health risks. Thus, the amendments applied retroactively to this case.

It is anticipated the State will argue that under RCW 10.01.040 (savings clause), which generally provides that any amendment to a penal statute must apply prospectively unless the amendment has language indicating a contrary intent, the amendments do not have retroactive application because there is no indication the legislature intended retroactive application. That argument should fail.

Even assuming RCW 10.01.040 applies to remedial amendments, the legislature intended the amendments have retroactive application. To avoid application of the savings clause, courts do not require that the Legislature explicitly state its intent that amendments apply retroactively to pending prosecutions. State v. Ross, 152 Wn.2d 220, 238, 95 P.3d 1225 (2004). The legislative intent need only be expressed in words that fairly convey that intention. Id., (citing State v. Zornes, 78 Wn.2d 9, 13, 475 P.2d 109 (1970)).

The Legislature indicated the amendments were intended to clarify its intent that the use of marijuana "is not impaired" and to allow

"qualifying patients" to "fully participate in the medical use of marijuana" and ensure that patients and designated providers are able to "assist patients in the manner provided by this act without fear of state criminal prosecution." (Laws of 2007, ch. 371, § 1). The Legislature indicated the amendments clarify its intent the medical use of marijuana should be given and expansive interpretation by police and judges and be made available to persons who may, but not necessarily will, benefit from its use regardless of the health risks. There is no rational reason why the Legislature would limit the medical use of marijuana to those persons who may benefit from its use merely because their use occurred before the amendments. The amendments to the statute and the statement of legislative intent accompanying the amendments fairly conveys the Legislature's intent the amendments be applied retroactive.

Dr. Rakita's the October, 2005 statement meets the Act's amended definition of valid documentation because the statement implies that in his professional opinion, Dr. Rakita believes Mr. King may benefit from the medical use of marijuana. Because the Act's amendments have retroactive application, the amendments apply to this case. Thus, McCarty was entitled to assert her affirmative defense to the jury.

Under both the former and amended Act, McCarty presented sufficient evidence to assert an affirmative defense. The court's order denied McCarty the right to present her defense. This Court should reverse McCarty's conviction and remand for a new trial. Ginn, 128 Wn. App. at 885.

2. THIS COURT SHOULD REMAND THIS CASE BECAUSE THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW.

"CrR 6.1(d) requires entry of written findings of fact and conclusions of law at the conclusion of a bench trial." State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998).<sup>5</sup> The trial court and the prevailing party share the responsibility to see that appropriate findings and conclusions are entered. State v. Vailencour, 81 Wn. App. 372, 378, 914 P.2d 767 (1996).

This rule applies as well to stipulated facts trials. In a stipulated facts trial the defendant does not stipulate to guilt. Instead, the trial court

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<sup>5</sup> CrR 6.1(d) provides:

In a case tried without a jury, the court shall enter findings of fact and conclusions of law. In giving the decision, the facts found and the conclusions of law shall be separately stated. The court shall enter such findings of fact and conclusions of law only upon 5 days' notice of presentation to the parties.

must make that determination. State v. Jacobson, 33 Wn. App. 529, 534, 656 P.2d 1103 (1982), *review denied*, 99 Wn.2d 1010 (1983). In a stipulated facts trial, the right to appeal is not lost and the state continues to bear the burden of proving each element of each charge beyond a reasonable doubt. State v. Mierz, 127 Wn.2d 460, 469, 901 P.2d 286 (1995).

The written factual findings should therefore address the elements of the crimes separately and state the factual basis for the legal conclusions as to each element. State v. Denison, 78 Wn. App. 566, 570, 897 P.2d 437, *review denied*, 128 Wn.2d 1006 (1995). The purpose of written findings and conclusions is to ensure efficient and accurate appellate review. State v. Cannon, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996); *see*, Head, 136 Wn.2d at 622 ("A prosecuting attorney required to prepare findings and conclusions will necessarily need to focus attention on the evidence supporting each element of the charged crime, as will the trial court. That focus will simplify and expedite appellate review.").

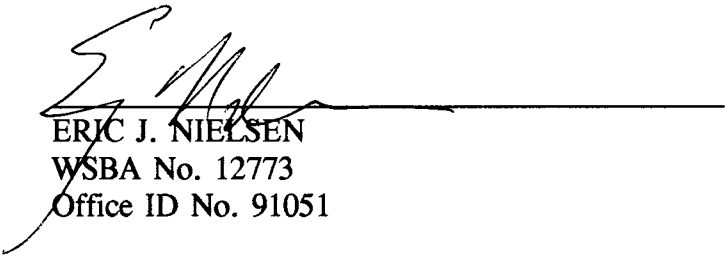
The current state of the record in McCarty's case prohibits effective appellate review. Although the court made oral findings, those oral findings do not indicate what evidence the court relied on in determining guilt. Moreover, the court's oral findings are not a suitable substitute for

case for a new trial. Alternatively, this Court should vacate and remand this case for entry of appropriate findings of fact and conclusions of law.

DATED this 26<sup>th</sup> day of September, 2008.

Respectfully submitted,

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COA NO. 37693-8-II

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STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 25<sup>TH</sup> DAY OF SEPTEMBER, 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ANN LUNDWALL  
CLALLAM COUNTY PROSECUTOR'S OFFICE  
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[X] STEPHANIE McCARTY  
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**SIGNED** IN SEATTLE WASHINGTON, THIS 25<sup>TH</sup> DAY OF SEPTEMBER, 2008, 2008.

x *Patrick Mayovsky*